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JAMES H. McKE

Supreme Court of the United States

OCTOBER TERM, 1902

No. 257 21

THE DEFIANCE WATER COMPANY, Appellant,

vs.

THE CITY OF DEFIANCE AND THE COUNCIL OF THE CITY OF DEFIANCE, Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

DEFENDANTS' BRIEF

FRED L. HAY, City Solicitor.
HENRY B. HARRIS and JOHN P. CAMERON, Solicitors for the Council of the City of Defiance.

Supreme Court of the United States.

THE DEFIANCE WATER COMPANY,
Appellant,

v.

THE CITY OF DEFIANCE AND THE COUNCIL OF THE CITY OF DEFIANCE,
Appellees.

STATEMENT.

On the 4th of January, 1898, the City of Defiance, Ohio, by its solicitor, brought suit against the council of the city of Defiance, Ohio, and the Defiance Water Company, to have enjoined and prohibited all future payments under a certain alleged contract, attempted to be made on August 17, 1887, by and between the council of said city of Defiance and Samuel R. Bullock & Company (and by said Bullock & Company assigned to said The Defiance Water Company, as provided for in said contract), for the furnishing of water to said city of Defiance by said water company for the term of thirty (30) years from said August 17, 1887, for the reasons that said contract was made without vote authorizing it and without certificate made and filed as required by Section 2702, Revised Statutes of Ohio, and was made for the term of thirty years; and it was averred in said petition that, for each and all said reasons, said con-

Petition in state court.

tract and all action thereunder was void and prohibited by the Ohio statutes. (Rec., p. 148, *et seq.*)

A preliminary injunction was granted in said cause as prayed for. (Rec. 151.)

Proceedings and decree.

This cause was removed by the Defiance Water Company to the circuit court of the United States for the northern district of Ohio, western division. (Rec., p. 153.) A cross-bill was filed by said water company against said city and the council of said city. (Rec., p. 156.) On motion of the city and the city council, said cause was remanded to the common pleas court of Defiance county, Ohio, and the water company had leave to withdraw its cross-bill. (Rec., p. 156.) Upon the cause being remanded, a demurrer was filed by the water company to the petition and sustained, and the city not desiring to amend, the petition was dismissed and the cause appealed to the circuit court of Defiance county, Ohio. (Rec., pp. 157, 159.) In Ohio, on appeal, causes are tried *de novo* in the appellate court. In the circuit court the demurrer was overruled (Rec., p. 164); the water company answered (Rec., pp. 166 to 174), and the city replied to this answer (Rec., p. 175). The cause was submitted on the issues so joined and a finding and final decree rendered in favor of the city and against the water company and the city council. (Rec., p. 192.)

Bill in federal court.

Upon the federal court remanding the said cause, the water company withdrew its cross-bill theretofore filed in said court (Rec., p. 156), changed the title of said cross-bill and filed it as a bill in equity in said court against the city of Defiance and the council of the city of Defiance. (Rec., p. 1.) Said complainant, by said bill and amendments which it made thereto, sought to recover hydrant rentals from said city under said contract (Rec., p. 174), asked that said contract of August 17, 1887, be declared valid, said city and its council enjoined from disputing its validity or refusing to pay the amounts there-

tofore or thereafter payable thereon according to its terms. (Rec., pp. 1 to 27.) To this bill the city and city council filed demurrer (Rec., p. 29), and plea (Rec., p. 36) supported by answer (Rec., p. 52), which were overruled, and thereupon they filed answer (Rec., p, 56), which, on the water company's motion, was adjudged sufficient. (Rec., p. 79.) The water company filed replication. (Rec., p. 80.) Evidence was taken and filed by the respective parties.

Proceedings and issues.

Before the cause was reached for hearing, the final decree of March 15th was entered in the circuit court of Defiance county, as above stated, and on May 2nd the city and the city council applied for leave to plead the judgment of the state circuit court as *res adjudicata* of the water company's suit in the federal circuit court. (Rec., p. 87.) On May 28th this was allowed on designation of said pleading being changed from supplemental answer to plea. (Rec., p. 89.) This plea was set down for hearing, heard and adjudged sufficient. (Rec., p. 96.) The water company replied to it on August 5, 1901, and evidence was taken and filed on the issues joined touching said plea. (Rec., p. 97.) On the 21st of December, 1901, the cause was heard on said plea and the evidence thereon, whereupon said plea was sustained and the complainant's bill was dismissed, at its costs, and costs adjudged to the defendants. (Rec., p. 98.)

Plea of res adjudicata.

Decree.

The proceedings of parties and the circuit court on said hearing are recited and set forth in the text of the final decree of December 21, 1901. (Rec., pp. 98 to 100.)

The water company appealed from said decree to this court and filed ten (10) assignments of error (Rec., pp. 101, 102) as the basis of its request for a reversal of the judgment and decree of the said circuit court.

Appeal.

The substance of these assignments of error is that the court erred :

(1) In permitting the plea, and the transcript from the state court to be filed.

(2) In holding the plea sufficient.

(3) In refusing to hear the case on all the issues joined and on all the evidence taken in the case by the water company.

Assignments of error.

(4) Same as number 3.

(5) In admitting evidence offered by defendants.

(6) In rejecting evidence offered by the plaintiff on the hearing.

(7) In adjudging the plea should be sustained.

(8) In refusing to hear the case on the original pleadings and evidence in support thereof.

(9 & 10) In holding the plea extended to the whole issues and was conclusive thereof, and in making final decree in favor of defendants.

ARGUMENT.

—1—

Did the court err in permitting the plea and transcript to be filed?

Errors not separately assigned.

The first assignment of error asserts that the court erred in permitting the defendants to file the plea and the transcript of the record from the state court. (Rec., p. 100.)

This assignment does not comply with Rule 35, which prescribes that assignments of error "shall set out separately and particularly each error asserted and intended to be urged * * * errors not assigned according to this rule will be disregarded. * * *"

Equity Rule, 35.
Rule Supreme Court, 21.
Section 997, Revised Statutes.
Clark v. Deere & Mansur Co., 25 C. C. A. 619, *621.*

U. S. v. I. G. D. Dist., 29 C. C. A. 578.
Rowe v. Phelps, 152 U. S. 88.

Without waiving our claim that this first assignment should be disregarded, we submit the action of the circuit court, challenged by this assignment, was right.

As to leave to file the plea.

When the application for leave to file the plea (supplemental answer, as it was then denominated) was presented to the court, its discretion was appealed to, and we apprehend that in order to reach a proper decision it had to consider and determine only two questions, viz: Did the plea tendered by the defendants, on its face, present a *prima facie* defense to the suit of the water company, or to some material issue or fact therein controverted? Were the defendants reasonably diligent in asking leave to file such plea? Leave to file plea.

The defense set up by the pleading is a *former adjudication.* The essential elements to make a good plea of former adjudication, are: (1) That the adjudication was made by a court of competent jurisdiction on the merits. (2) That the suit in which the adjudication was made was between the same parties as the suit in which the adjudication is plead, or their privies, and in the same relation; and (3) That the two suits involve the same issues and the adjudication was based thereon; or that some right, question, or fact on which the plaintiff's right of recovery in the pending cause depends, was distinctly put in issue and adjudicated in the former case, although the former suit was for a different cause of action; or, where the suits are between the same parties, that the pending suit involves the same title and depends upon the same questions, even though based on a different subject matter. Rule laid down in: Requisites of plea.

Bigelow v. Winsor, 1 Gray, 299.
1 Greenleaf Ev., Sec. 532, note.

Linton v. Nat. Life Ins. Co., 104 Fed. Rep. 584 (C. C. A.)

City of Aurora v. West, 7 Wall. 82, *90*; B. 19, p. 42.

New Orleans v. Cit. Bank. 167 U. S. 371, B. 42, p. 355.

So. Pac. Ry. Co. v. U. S., 168 U. S. 1; B. 42, p. 202.

Freeman on Judgments, Vol. 1, Secs. 252, 255, 259.

Norton v. House of Mercy, 41 C. C. A. 399.

Meis v. Gill, 44 O. S. 253.

Gas Light Co. v. Zanesville, 47 O. S. 35.

Tiago Ry. Co. v. B. & C. Ry. Co., 20 Wall. 137.

Cromwell v. Sac. Co., 94 U. S. 351.

Madison v. Garfield Coal Co. (Ia.), 86 N. W. Rep. 41, 47, and cases.

Stewart v. Village of Ashtabula, 107 Fed. Rep. 857.

Mitchell v. First Nat. Bank, 180 U. S. 471.

Allis v. Davidson, 23 Minn. 442.

Duden v. Maloy, 43 Fed. Rep. 407.

Gordon v. Johnson, 3 Col. App. 139; 32 Pac. Rep. 347.

Smith v. Kernochen, 7 How. 198, 217.

Thompkins v. Hyatt, 28 N. Y. 347, and cases hereafter cited.

In the case at bar in June, 1898, the water company sued the city and the council of the city on the alleged contract of August 17, 1887, which it seeks to have declared valid. It prays for a decree that the city and the city council be enjoined from disputing the validity of the contract, or the amount payable thereunder, and that the contract be adjudged a valid and existing obligation of the city and that the council be ordered to make payment thereunder. (Rec., p. 1.) The right to this relief is based on two contentions: (1) *That the original contract was*

Plea sufficient.

and is valid, and (2) *that whether valid or not the city and its council were estopped from asserting its invalidity.* These claims are denied by the city and the city council, and the alleged contract is averred to be illegal, void, and prohibited by statute. (Rec., p. 56.) Under these circumstances the right to the relief, or any of it, prayed for by the complainant, depends upon the basic fact, *a contract between the city and the water company*, made to appear from a valid contract, or from an informal or irregular contract aided by certain estoppels.

The suit in the state court was commenced first on January 4, 1898, by the city against the council and the water company to enjoin and prohibit the payment of any amount claimed then to be due or thereafter to become due the water company under the contract, averring the same facts that are alleged in the answer in the federal court. (Rec., p. 148.) To this petition the water company set up a denial of the facts alleged as constituting the invalidity of the contract and a claim of its validity, and set forth each and all of the facts which it claimed constituted an estoppel against the city and the city council in substantially the same words as in its bill and amendments and supplements herein. To this the city replied. (Rec., p. 166.)

Same.

On these issues the state court, after hearing all the evidence offered by both parties, pursuant to a motion made by plaintiff at the close of the evidence in support of the water company's answer, adjudged the contract illegal and void, enjoined its performance or the payment of anything to the water company thereunder, and enjoined the council from taking any measures looking to the carrying out of said contract. (Rec., p. 192.)

Judgment in state court.

It is claimed by the defendants that this constituted a complete adjudication to complainant's present suit, because it appears the judgment sought to be pleaded was rendered by a court of competent

Judgment a bar.

jurisdiction, was a final judgment between the same parties in the same relation, and adjudicated certain rights, questions and facts which were then and there in issue and on which complainant's right to recover in this suit depends.

Ransom v. City of Pierre, 41 C. C. A. 585.
Bissel v. Spring Valley, 124 U. S. 225; B. 31, p. 411.
Hinton v. MacNeil, 5 Ohio 509, *511.*
Gas Light Co. v. Zanesville, 47 O. S. 35.
Freeman on Judgments, Sec. 328.
Herman on Estoppel, Sec. 554.
Werlin v. City of New Orleans, 177 U. S. 390; B. 44, p. 817.
Townsend v. St. Louis, C. & M. Co., 159 U. S. 21; B. 40, p. 61.

Former adjudication defined.

Pac. Natl. Bank v. Miller, 124 U. S. 721; B. 31, p. 567.
Stell Co. v. Erskine, 39 C. C. A. 173.
Freeman on Judgments, Vol. 1, Sec. 330.
Daniel's Chancery Practice, Vol. 1, Sec. 696.
Thompson v. Wooster, 114 U. S. 104; B. 29, p. 105.
Herman on For. Adj., Vol. 1, Sec. 54.
St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142.

In *New Orleans* v. *Bank*, 167 U. S., on page 398, Mr. Justice White, in defining *res adjudicata*, says:

"No principle of law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies. Whether the reasons upon which it is based were sound or not, and even if no reasons at all were given, the judgment imports absolute verity and the parties are forever estopped from disputing its correctness. Cooley Const. Limit., 47, *et seq.*, and authorities there cited. 'Matters once determined in a court of competent jurisdiction may never again be called into question by parties or privies against objection, though the judgment may have been erroneous and liable to and certain of reversal in a

higher court.' Bigelow Estoppel, 3rd ed., Outline, pp. LXI, 29, 57, 103. The estoppel extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause and was determined therein."

Identity of actions.

In the case of *Billings* v. *Gillmer*, 8 C. C. A. 645, *648*, the court adopts the rule stated by Mr. Freeman as the test for determining the identity of the cause of action, viz:

"When the evidence necessary to sustain a judgment for the plaintiff in the present suit would have authorized a judgment for him in the former suit the cause of action is said to be the same. 1 Freeman Judgments, Sec. 259; 2 Black Judgments, Sec. 726." See also: Werlin v. New Orleans, 177 U. S. 390; B. 44, p. 817.

Applying the rule to the case at bar it is clear the water company must offer evidence sufficient to establish a valid contract, or a contract which the city and council are estopped to dispute, and that something is now or will hereafter be due to it thereon. If these facts had been established in the suit in the state court the water company must have had a decree in its favor, hence the judgment in the state court comes within the above rule and is properly pleaded as *res adjudicata*.

Form immaterial.

It is immaterial whether the questions arise in the same form of action, or which party has the affirmative of the issue, or the burden of the proof.

Gas Light Co. v. Zanesville, 47 O. S. 35, *49*.
Norton v. House of Mercy, 41 C. C. A. 399.
Burnett v. Smith, 4 Gray, 50.
Hopkins v. Lee, 6 Wheaton, 109, *113*.
Smith v. Kernochen, 7 How. 198, *216*.
Mason Lumber Co. v. Butchel, 161 U. S. 638.
Curtis v. Cisna, 1 Ohio 429.
Green v. Bogue, 158 U. S. 478, 2nd Syl.

As to leave to file copy of final record of the case in the state circuit court.

Leave to file record.

(a) No prejudice could result to the plaintiff from the filing of this. It was simply in the nature of an exhibit to a pleading, a submission or exhibition to the court and the opposite party of the documentary evidence on which the defendants, in part at least, would rely. Profert was made of the record of the judgment to conform to a long line of cases, state and federal, of which Ford v. Jefferson Co., 4 Ia., 566, and Parsons v. Sewell, *supra*, are at the head. It was the showing that defendant's claim was made in good faith and supported by some substantial proof. It disclosed when the final decree was made, and showed that the defendants had been reasonably diligent in making their application for leave to file the plea.

Application, p. 87; leave to file, p. 88.
Transcript, pp. 148-195, printed Record.

(b) This proffered record was of no avail, unless it was offered in evidence, hence no prejudice could result.

Same.

(c) The record does not disclose any objection was made to the transcript at the time of the application, or to the sufficiency of the certificate, or that it was insufficient, but discloses that the only exception made was the general exception at the end of the order by which the *complainant excepted to the orders made without assigning any ground whatever.* The record shows that the complainant made one exception to the orders allowing the filing of the plea and the filing of the transcript, but does not show any question as to the sufficiency of the certificate, was made in the court below, and the ruling of the court asked thereon. We apprehend, under the well settled practice of this court, the complainant's alleged ground of error first imported into this case by its assignment of error will not be considered. (Rec., p. 96.)

Ausbro v. U. S., 159 U. S. 605; B. 40, p. 310.
Cornell v. Green, 163 U. S. 75; B. 41, p. 76.

See p. 17 Reply Brief

Did the court err in holding the plea sufficient in law?

The pleading sets out the facts which show the pendency of a suit in a court of competent jurisdiction between the same parties, the substance of the pleadings, viz., the petition, the answer, and the reply in that suit, that on those pleadings a trial was had on the merits and a final judgment given and rendered on the merits of the controversy as the result of that trial. The judgment so made and rendered is set forth. It is alleged that the contract in controversy in the case at bar and in the case so adjudicated is the same contract, and that the judgment so rendered, is in full force and effect, unreversed and unsatisfied. (Rec., p. 89.)

Plea was sufficient.

In *Aurora* v. *West*, 7 Wall. 82, Mr. Justice Clifford, speaking for the court, says:

"When a former judgment is set up, in bar of an action or as having determined the entire merits of the controversy, it is not required to be pleaded with any greater strictness than other plea in bar, or in any plea in avoidance of the matters alleged in the antecedent pleading of the opposite party. Gray v. Pingrey, 17 Ver. 419; Perkins v. Walker, 19 Ver. 149,—Greenleaf Ev., Sec. 566; Shelly v. Wright, Willis, 9."

All authorities agree that a plea of former adjudication is favorably considered. Mr. Freeman says: "* * * the vocabulary of the judges has been well nigh exhausted to supply it with honorable and endearing titles." This is so, because (1) the parties are not entitled to litigate a question twice; (2) in comity, courts do not favor considering cases which have been once decided by courts of competent jurisdiction; (3) public policy dictates one adjudication is sufficient and should be final unless reversed by an appellate court, and the finality of judgments is a

Plea favored.

matter of public concern, and the courts will aid in making such judgments final.

1 Greenleaf Ev., Sec. 531.

The sufficiency of this plea is considered in the first section of this brief, page 5, *et seq.*, *ante*.

—3—

Did the court err in refusing to hear the case on all the issues joined and on all the evidence taken in the case by the water company?

Hearing on general issues refused.

This assignment predicates error in the action of the court in refusing the hear the cause upon the grounds made upon the bill as amended and the supplemental bill, the answer and replication, and the proofs offered by the plaintiff in support of said issues. It presents two distinct matters under one assignment, viz., "issues" and "proofs." It is restricted to "the proofs offered by plaintiff in support of said issues." The trial court overruled the request to hear the case on the issues and proofs filed in the case. The proofs are not printed and this court cannot say the trial court erred, because, if any part of the proofs were improper, the ruling is not erroneous. The court cannot be expected to go over the evidence taken by complainant and select out and admit its competent and material "proofs." No part of defendants' "proofs" on the general issue are in the record.

"That error will not be presumed, is a familiar and well settled general rule in appellate courts. Whoever seeks the reversal of a judgment or order, whether in a civil or criminal case, must come prepared to show by the record, not only that error has intervened, but that it has been to his prejudice. McHugh v. State, *ante*, 154. So strict is this rule, that while it is settled that a judgment will not be reversed for the exclusion of evidence, unless every material part of it was competent for the purpose stated by the party offering the same (citing cases), it is equally well settled that where evidence is

admitted against a general objection, the judgment will not be reversed for that cause, if any material part of such evidence was competent for any purpose (citing cases); and the principle is further illustrated by the rule, that where specific objections are made to the introduction of evidence, this, on error, is a waiver of all other objections in that respect (citing cases)."

Kent v. State, 42 O. S. 426, *430*, and cases.
Smith v. Arsenal Bank, 104 Pa. St. 518.
Bube v. Bull, 12 Wend. (N. Y.) 504.
Phila. & Trenton R. Co. v. Simpson, 14 Pet. 448, *459*.

We conceive that the very purpose and object of a plea of *res adjudicata* is to obviate and prevent a retrial on the merits. It would be a vain thing to plead a former adjudication if, when that were determined affirmatively for the defendant, before the court could enter judgment thereon, the parties must take testimony and the court must proceed to hear the case on the original issues and adjudicate on them. Object of plea.

Mr. Justice Gray, speaking for this court, in *Farley* v. *Kitson*, 120 U. S. 303, *315*, says:

"But the proper office of a plea is not, like an answer, to meet all the allegations of the bill; not like a demurrer, admitting those allegations, to deny the equity of the bill; but it is to present some distinct fact, which of itself creates a bar to the suit, or to the part to which the plea applies, and thus to avoid the necessity of making the discovery asked for, and the expense of going into the evidence at large. Mitford Pleading (4 ed.), 14, 219, 295; Story Eq. Pl., Secs. 649, 652."

Equity rule 33 declares:

"If, upon issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and in equity they ought to avail him."

This court, speaking by Mr. Justice Jackson, in *Horn* v. *Detroit Dry Dock Company*, 150 U. S. 610, *625*, says: Plea requires final decree.

"But even under this rule, when the plea meets and satisfies all the claims of the bill, it ought in law and equity to avail the defendant so far as to require a final decree in his favor."

In *Greene* v. *Bogue*, 158 U. S. 499, the rule is again considered and the court decide a former adjudication gives a defendant full protection in a case involving the principles here invoked.

Controverted questions.

We apprehend the words "all the claims of the bill," when applied to a plea of former adjudication, mean those claims essential to maintain the bill and necessary to be proven in order to obtain any relief prayed for. In the case at bar the controverted claims of the bill necessary to be proven were (1) a valid contract with the city, or (2) an invalid or unenforceable contract, the invalidity of which and refusal of payment thereunder the city is estopped to dispute; (3) that some amount is owing to the company from the city on said contract or by virtue of the contract and the estoppel.

All of these things were set up in the answer in the state court, and were determined by that court's judgment. (Rec., pp. 166 to 174.) (Rec., pp. 1 to 10.)

As illustrating the meaning and application of rule 33 we call the court's attention to the following cases in inferior courts:

Earl v. Met. St. Ry. Co., 87 Fed. Rep. 528.
Elgin Wind-pump & Power Co. v. Nichols, 12 C. C. A. 578.
See also U. S. v. C. & O. L. Co., 148 U. S. 31, *39*.

Same in state court.

But whether we are right in the view last expressed or not, all the claims in the bill were set up by the company in its answer to the city's petition in the state court, and were, or might have been litigated, and were determined in and by the judgment of the state court here pleaded as an adjudication.

See :

Water Company's Bill, Rec., pp. 1 to 10.
Amendment, Rec., pp. 25, 26.
Supplemental Bill, Rec., pp. 33, 34.
Amendment to Bill, Rec., p. 86.
City's Petition in State Court, Rec., pp. 148, 150.
Water Company's Answer, Rec., pp. 166 to 174. Reply, p. 175.
Plea of City and City Council, Rec., pp. 89 to 94.

— 4 —

Did the court err on the hearing on the plea, in refusing to hear the case on all the issues and proofs offered by the plaintiff in the case?

Complainant's proofs.

This assignment is covered by No. 3 above and by No. 6 hereafter. It relates to the refusal of the court to hear the case on the general issues, and on the water company's evidence only on the general issue.

— 5 —

Did the court err in admitting the evidence offered by defendants in support of their plea?

Admission of evidence.

(a) The evidence offered was a transcript of the record of the proceedings and judgment of the circuit court of Defiance county, Ohio, in the case of the City of Defiance, by Edwin A. Latty, its City Solicitor, v. The Council of the City of Defiance and the Defiance Water Company. (Rec., pp. 148 to 195.) (Original Rec., 247 to 327, inclusive.)

This fifth assignment of error sets forth that this transcript was objected to, (1) because it does not appear it is a complete transcript, (2) because it is not duly certified. The objections are set forth in

the decree and the only objection made in the lower court is in the words following:

"To the receiving of said certified transcript in evidence the complainant, by its counsel, objected, on the ground that it does not purport to be, and the certificate of the clerk does not show it to be, a complete transcript of the record and proceedings of the case." (Rec., p. 98.)

Complete transcript.

The first ground of the assignment of error, that the transcript did not purport to be a complete transcript of the record of the proceedings in the state court, we think is not well taken. The law of Ohio requires a final record to be made of each case, directs when it shall be made, and what it shall contain (Secs. 5333, 5334, Rev. Stat. Ohio); but provides that the bill of exceptions shall not be recorded unless so ordered by the court for good reason and that the evidence shall not be recorded. (Section 5354.) So that, the certificate is *prima facie* a showing of a complete record when it sets out that it is copied from the final record of the case. At any rate, it shows the various things required by the Ohio statutes to be made part of the final record. (Sec. 5354.)

Ferguson v. Harwood, 7 Cranch, 408, *412.*

Entire record unnecessary.

The court below followed the ruling of the circuit court of appeals in the case of *Preist* v. *Glenn*, 2 C. C. A. 305, where an objection was made to a transcript of a record because it did not appear that it contained the entire record of the case, and the court say:

"All parts of the proceeding in that case which were essential to support the issue on behalf of the trustee in this case were included in the transcript objected to, and we can conceive of no good purpose that would have been subserved by the introduction of wholly irrelevant matter. If there were portions of the record of value to the defendant below, it was open to him to introduce; and therefore the objection urged to the record introduced, that it was par-

tial only, cannot be sustained, when it is not pointed out that any part of the record omitted was necessary to sustain the issues on behalf of the plaintiff below."

See also O'Hara v. Mobile & O. R. Co., 22 C. C. A. 512.

(b) The transcript offered by defendants, on its face, purports to be a record of the suit from the filing of the petition and issue of summons on January 4, 1898, down to May 3, 1900, the date of clerk's certificate, including the allowance of the bill of exceptions, April 4, 1901, and all the pleadings, judgments, and orders in the case, and therefore is evidence tending to support the allegations of the plea and is admissible under the principles enunciated in the cases last above cited. (Rec., pp. 148 to 195.)

Admission not prejudicial.

(c) The complainant tendered what it claimed to be and what the clerk certified is a complete transcript of the "*record, proceedings, and original papers as they appear on the records and files of the said court in my office.*" (Rec., p. 196.) In so much of this transcript as the appellant has deemed of sufficient importance to print for the use of this court there are three items which do not appear in the transcript given in evidence by the defendants in support of this plea. These items are (1) a transcript of the appearance docket entries in the state court (Rec. p. 202); (2) a copy of one paragraph from the bill of exceptions reciting the making of an oral motion by counsel for the plaintiff during the trial (Rec., p. 203), and (3) the conclusion and signature of the bill of exceptions, taken by the water company after term, in accordance with the Ohio practice. (Rec., p. 203.) The record shows that every journal entry set forth in the record offered by the water company (pages 196 to 202 inc.) is contained in the transcript offered by the defendants. (Rec., pp. 161, 163, 164, 165, 187, 188, 190, 191, 192, 193, 194.)

Docket entries not part of record.

The first item of evidence not appearing in appellee's transcript is the copy of appearance docket entries. This was an exhibit to the water company's petition in error in the Supreme Court of Ohio; and, in law and in fact, was no part of the final record of the case in the circuit court.

Secs. 5334 and 6716, Rev. Stat. of Ohio.
Moore v. Brown, 10 Ohio, 197.

The original record shows that the printed record in the Supreme Court of Ohio was used by the complainant as a copy of the record in the circuit court, without expunging therefrom the portions thereof which never were part of the record of the circuit court. Even the file marks and signature of the clerk of the Supreme Court of Ohio (p. 204), as well as other parts never in the circuit court, are thus included.

Motion immaterial.

The second item, disclosing the fact that an oral motion was made by counsel during the progress of the trial, does not embody any evidence of importance in determining the issues joined on the plea of *res adjudicta.* (Rec., p. 203.) But if it were proper the same fact is shown by the decree. (Rec., p. 192, bottom.)

The same is true as to the third item, the conclusion and signature to the bill of exceptions. (Rec., p. 203.)

No prejudice shown.

Assuming, for the purposes of the argument, that the transcript given in evidence by the city and its council was not complete, the water company has put into the record and before the court a clear showing that no prejudice resulted therefrom, by submitting what it claims to be a complete transcript and thereby showing that that transcript contained nothing material to the issues which was not included in the transcript offered by the defendants.

We conclude, therefore, that the objection that the transcript did not purport to be a complete record

of the case in the state court was properly overruled, and, even if not, no prejudicial error intervened by reason of that ruling.

The assignment of error asserts that this transcript was objected to because it was not duly certified.

The objection is set out in the decree and is in these words:

"To the receiving of said certified transcript in evidence the complainant, by its counsel, objected on the ground that it does not purport to be, and the certificate of the clerk does not show it to be, a complete transcript of the record and proceedings of the case." (Rec., p. 98.)

Objection that was made.

No objection was made because of the certificate, and the court was not called upon to pass on and did not consider any objection based on its insufficiency. The exact question here presented was considered by this court in *Wood* v. *Weimer*, 104 U. S., 786, *795*, wherein an assignment of error was predicated on the certificate authenticating the copy of a deed. The court, speaking by Mr. Chief Justice Waite, says:

None to certificate.

"In this connection it is proper to consider the exception which was taken to the introduction in evidence of the deed from Stewart to Terwilliger. The language of the exception, as recorded in the bill of exceptions, is as follows: 'To the reading in evidence of which deed, plaintiff, by its counsel, objected, for that it was incompetent, immaterial and irrelevant.' It is now insisted that 'The attestation of the recorder of deeds of the correctness of the transcript was not certified to be in due form, and by the proper officer, as required by the act of congress of March 27, 1804 (2 Stat. at Large, 298), prescribing the mode in which the public records in each state shall be authenticated, so as to take effect in every other state.' This was not the objection made below, and it comes too late here. There the attention of the court was called only to the competency, materiality, and relevancy of the deed; here to the form of the authentication of the copy. The rule is universal that nothing which occurred in the progress of the trial can be assigned for error here,

Cases.

unless it was brought to the attention of the court below, and passed upon directly or indirectly. It is clear that the ruling complained of in this case was in respect to the effect to be given the deed when proved, and not to the form of making the proof. We see no error in the judgment below as to this item in the claim for allowance under the mortgage."

In *Camden* v. *Doremus et al.*, 3 Howard, 515, *530*, Mr. Justice Daniel, delivering the opinion of the court, says:

"Upon the offer of testimony, oral or written, extended and complicated as it may often prove, it could not be expected, upon the mere suggestion of an exception which did not obviously cover the competency of the evidence, nor point to some definite or specific defect in its character, that the court should explore the entire mass for the ascertainment of defects which the objector himself either would not or could not point to their view. It would be more extraordinary still, if, under the mask of such an objection, or mere hint at objection, a party should be permitted in an appellate court to spring upon his adversary defects which it did not appear he ever relied on; and which, if they had been openly and specifically alleged, might have been easily cured. 'Tis impossible that this court can determine, or do more than conjecture, as the objection is stated in the record, whether it applied to form or substance, or how far, in the views of it presented to the court below, if any particular view was so presented, the court may have been warranted in overruling it. We must consider objections of this character as vague and nugatory, and, if entitled to weight anywhere, certainly as without weight before an appellate court."

Cases.

Mr. Seymour D. Thompson clearly states the rule and aptly illustrates it. He says:

"Where evidence is objected to at the trial, if the party would save an objection to the ruling of the court if adverse to him, such as will be available upon appeal or error, he must frame his objection so as to bring to the attention of the trial court the specific ground upon which he predicates it, and this must be stated in his bill of exceptions. He waives all grounds not so specified. The reason of the rule is

Rule and illustrations.

twofold: 1. To enable the trial judge to understand the precise question upon which he has to rule, and to relieve him from the burden of searching for objections which counsel is unable to discover, or which he sees fit to conceal. 2. To afford the opposite party an opportunity to obviate it before the close of the trial, if well taken. It is, therefore, a part of the rule that the party objecting to testimony will not be permitted to change his ground on appeal; otherwise the trial court might decide the objection on one ground; and the appellate court on another. This would produce uncertainties and injustice. Thus, it would be a monstrous rule that would permit a defendant in an action of ejectment to object to a deed, on which the plaintiff depended to make out his title on the ground that it was defectively acknowledged, and then to renew his objection to the appellate court, on the ground that it was a forgery; or that he should object to it in the trial court on the ground of irrelevancy, without stating any other ground, and should then renew his objection in the appellate court on the ground of a defective acknowledgment. Such a rule would level the appellate courts to the position of trial courts, would overturn all just conceptions of appellate procedure in cases at law, and would result in making the hearing of an appeal in such an action a trial *de novo*, without the presence of witnesses or the means of obviating errors or omissions."

Thompson on Trials, Sec. 693, Vol. 1, p. 560.
See also Hindes' Lessee v. Longworth, 11 Wheaton, 199, *209*.
Mechanic's Sav. Bank v. Harding, 70 Pac. Rep. 655.

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Did the court err in rejecting the evidence offered by the complainant, the water company, on the issue joined on the plea?

Rejecting defendants' evidence.

This evidence was (1) the "transcript of the record, proceedings and original papers as they appear on the records and files of said circuit court in my office" in said case (Rec., p. 196); (2) the deposition of

W. A. Schmaltz, clerk of the circuit court of Defiance county, Ohio (Rec., pp. 204, 209); and (3) the transcript of the journal of the said circuit court showing the date of the adjournment of the April, 1901, term. (Rec., p. 196.)

Transcript.

(1) *The transcript.* As above shown, everything in the transcript down to May 3, 1901, had already been received in evidence (Rec., pp. 148 to 195), except the appearance docket entries in the circuit court (Rec., pp. 202, 203), the portion of the bill of exceptions showing the fact that an oral motion had been made by counsel for the city during the progress of the trial in the circuit court (Rec., p. 203), and the concluding paragraph of the bill of exceptions and the signatures of the circuit judges to said bill. (Rec., pp. 203, 204.)

Appearance docket entries.

The appearance docket of the court is provided for by Section 4957, and what it shall contain by Section 4958 of the Revised Statutes of Ohio, which sections are as follows:

"Section 4957. The clerk of the court of common pleas shall keep at least five books, to be called the appearance docket, trial docket, and printed duplicates of the trial docket, for the use of the court and the officers thereof, journal, record and execution docket, and an index to the trial docket, and the printed duplicates of the trial docket and journal direct, and to the appearance docket, record and execution docket, direct and reverse."

Same.

"Sec. 4958. The clerk shall enter on the appearance docket, at the time of the commencement of an action or proceeding, the names of the parties in full, with names of counsel, and forthwith index the case, direct and reverse, in the name of each plaintiff and defendant; he shall also enter, at the time it occurs, under the case so docketed, the issue of the summons, or other mesne process or order, and the filing of each paper; and he shall record in full the return on such writ or order, with the date of its return to the court, which entry shall be evidence of such service."

The final record of causes is provided for by sections 5332 and 5333, and what it shall contain by section 5334, Revised Statutes of Ohio, which sections are as follows:

"Sec. 5332. The clerk shall make a complete record of every cause as soon as it is finally determined, unless such record, or some part thereof, be duly waived." Final record.

"Sec. 5333. The clerk shall make up such record in each cause in the vacation next after the term at which the same was determined; and the presiding judge of the court shall, at the next term thereafter, subscribe the same."

"Sec. 5334. The record shall be made up from the petition, the process, the return, pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court; but if items of an account, or copies of papers attached to the pleadings, are voluminous, the court may order the record to be made abbreviating the same or inserting a pertinent description thereof, or by omitting them entirely. The bill of exceptions shall be filed with the pleadings and papers, but not recorded, unless the court for good reasons shall so order; and evidence must not be recorded."

From these sections it is plain that the appearance docket is not part of the final record. Indeed, everything in the appearance docket was already shown by the complete record given in evidence by the defendants below, so that if the appearance docket were part of the record the failure to admit the copy in evidence was not prejudicial. The appearance docket is simply a book kept to enable the court, its officers and others interested to conveniently determine the pendency and progress of any cause without leafing over the files and journals of the court. It is only the clerk's memorandum of his understanding of the action of the court, and is not even secondary evidence.

Roberts v. Brisco, 1 O. C. C. 577.
Approved on this point in 44 O. S. 596, *599*.

Papers and files no part of record.

The portion of the transcript of the *record, proceedings and files* which shows that an oral motion was made by counsel for the plaintiff, the City of Defiance, during the progress of the trial, we believe, was not under the law part of the record, and not an essential or material part in connection with the issues touching the plea of former adjudication on hearing in the circuit court. But, be that as it may, the final decree in the case showed the same thing, so that no prejudice could possibly have resulted from the rejection of this item. The court, in its final decree, finds "that the motion of the said plaintiff, made at the time the said defendant rested its case, for a finding and decree in favor of said plaintiff, etc." (Rec., p. 192, bottom.)

What is said of this is equally true of the concluding part of the bill of exceptions and signatures thereto.

But it does not appear that this evidence was competent for another reason. The certificate shows the paper offered is a transcript of the "record, proceedings and *original papers* as they appear on the records and files in my (the clerk's) office." Section 905 does not provide for copies of "*original papers*" "*on file*," but for copies of records. In Ohio copies of original papers can be used only where it affirmatively appears the record is not made up.

> Lessee of Morgan v. Burnett. 18 Ohio, 535, *545*.

The proceedings of a court must be proved by its record if a record is made up. There was no showing that this was part of the record and no showing the record was not made up.

> State v. Dawson, 6 Ohio 251, *253*.
> Noble v. Shearer, 6 Ohio 426, *427*.
> Young v. Buckingham, 5 Ohio 485.

(2) *The deposition of W. A. Schmaltz.* By the oral testimony of the clerk of the court, the Defiance Water Company sought to show that the judgment of the circuit court of Defiance county, in a suit in which it was a party, was not entered on the journal on the day of which it bears date, but was furnished by the judges afterward and by their direction entered as of the date the judgment was actually rendered. **Schmaltz's deposition.**

As between the parties the date of the record of a judgment, when shown on its face, is no more subject to dispute by oral evidence than is the amount of the judgment.

"The verity of a record applies to its date, and therefore evidence is not admissible to show that the date of the judgment as it appears in the judgment book and docket is incorrect." **Record not disputable by parties.**

Freeman on Judgments, Vol. 1, Sec. 76.
The State ex rel. v. The Judges, 53 O. S. 430.
Ferguson v. Kumler, 25 Minn. 183.
Morton v. W. U. Tel. Co., 53 O. S. 430.
Steinberger v. Steinberger, 19 Ohio, 106.
Hoagland v. Schnorr, 17 O. S. 31.

This is the rule in Ohio, notwithstanding Heirs of Ludlow v. Johnston, 3 Ohio, 553, which is sometimes cited as the single exception to this rule.

Jacks et al. v. Adamson, 56 O. S. 397, *401.*

The question has lately been exhaustively discussed by the Ohio Supreme Court in *Coe* v. *Erb*, 59 O. S. 259.

(3) *Adjournment of the circuit court sine die.* The fact that the court adjourned without day on March 15, 1901, is of no moment if the date of a judgment can not be disputed by a party to it. **Date of adjournment of court immaterial.**

The theory, on which the evidence referred to in this and the next preceding paragragh is offered, is that a judgment of a court is void, even as to a party

to the judgment, unless the entry thereof is written in the journal of the court during the term. We submit that the judgment shown by the record given in evidence by the defendants is *prima facie* valid. *Ferguson* v. *Harwood*, 7 Cranch, 408. To overcome the presumption of its validity created by the record of the judgment, assuming evidence to be competent to disprove it, it is not enough that the entry of the judgment was not written in the journal during term, but evidence must be produced tending to show such judgment, in fact, was not rendered of that date, or during term, but see printed record, p. 211, middle. Otherwise, the judges of the court would have to announce their opinions, thereby supplying *data* for clerk or counsel to prepare entries and then wait until the clerk had time to copy them into the journal before adjourning court in order to make the judgment of the court in force even between the parties.

Judgment actually rendered on date named.

When this contention was presented to the Supreme Court of Ohio, in the proceedings in error taken by the water company to reverse the judgment pleaded as a former adjudication, that court struck it out of the petition in error and refused to consider it.

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Plea sustained.

Did the court err in its opinion and finding that the plea should be sustained?

Error cannot be assigned on the opinion of the court.

Evans v. Suess O. G. Co., 28 C. C. A. 24, *27*.
North Am. Loan & Trust Co. v. Col. Mtg. Co., 28 C. C. A. 88.
Natl. Mas. Assoc. v. Sparks, 28 C. C. A. 399, *403*.
Russel v. Kerns, 16 C. C. A. 154.

The finding depends on the correctness of the determination of the questions above considered, and, if any were incorrectly decided, whether prejudice to the appellant resulted from such rulings, and whether the evidence established that the adjudication in the state court was by a court of competent jurisdiction, that the judgment was on the merits and was a final judgment and that it was based on and decided the issues involved in the case at bar, or some issue or fact which the complainant must establish to entitle it to any relief in this suit.

The correctness of the court's ruling and whether prejudice resulted therefrom need not again be discussed.

State court.

We believe this court takes judicial notice that the circuit court of Defiance county, Ohio, was a court of competent jurisdiction.

Hanely v. Donahue, 116 U. S. 1, 7.
N. Y. Fourth Natl. Bank v. Franklin, 120 U. S. 747.
Millis v. Green, 159 U. S. 651; B. 40, p. 293.

That the judgment was on the merits is shown by the transcript. (Rec., pp. 148, 195.)

Final judgment.

That the judgment was a final judgment under the laws of Ohio, that it can be reviewed only by the Supreme Court of the state, that such review is by "*proceeding in error*," that the judgment stands in full force and effect during the pendency of said error proceedings, which does not, of itself, even stay execution on such judgment, but such stay can only be obtained by giving bond in accordance with the Ohio statutes, and that such bond leaves the judgment still in force but temporarily suspends execution thereon, are facts so well established by the statutes of Ohio as not to require discussion.

On the merits.

In *Sharon* v. *Hill*, Judge Deady lays down the rule that the force and effect to be given to a state judgment by a federal court is prescribed by the act

of 1790 (Revised Statutes, 905), which provides, "*the records and judicial proceedings of the state courts shall have such faith and credit given them in every court within the United States as they have by law and usage in the courts in the states from which they are taken.*" This rule is recognized in the recent case of Hilton v. Guyot, 159 U. S. 113, *182*. See also, Hancock Natl. Bank v. Farnum, 176 U. S. 640; B. 44, p. 619. So that to determine what effect is to be given to an Ohio judgment by a federal court we must determine what effect is given to it by the law and usage of the Ohio courts.

Credit due to state decisions.

In *Lessee of Taylor* v. *Boyd*, 3 Ohio 338, at page 354, the court says:

"It is contended that a writ of error is but the continuance of the original suit, and like a bill of revivor, or an appeal, reinstates the suit, and refers all parties and things involved, to its first commencement. We do not concede that such, in all cases, would be the consequence of a bill of revivor or of an appeal. But in this case we think the analogy does not hold. In the obvious nature and character of the proceedings a writ of error is a new and original suit. Original process issues in it and must be served to bring the adverse party into court. The relative character of the parties is changed; new pleadings are made up, and a final judgment upon it, though it may operate upon the original cause, is nevertheless a termination of the new suit or process in error. We do not meddle with the nice distinctions, by which a writ of error has been treated as a defensive proceeding, and a continuance of the cause in which the party alleged he had been prejudiced by an erroneous judgment. Though this proposition has been urged *arguendo*, in the most respectable tribunals of our country, we are not apprised of any case where it is made a ground of decision. We adhere to the doctrine that the writ of error is a new suit."

Ohio rule.

In *Ludlow* v. *Kidd*, 3 Ohio 541, the court held a decree against infants is final, though they have rights after they become of age to attempt to reverse by a bill of review. The court hold the review

Same.

or error proceedings are new suits and not a continuance of the former suit.

A judgment is valid for all purposes till actually set aside or reversed.

Valid till actually reversed.

Lagrange v. Ward, 11 Ohio, 258.
Berry v. Greenfield, Wright, 348.
Goodrich v. Jenkins, Wright, 349.
Piatt v. Piatt, 9 Ohio, 37.

"An erroneous decree in chancery where a court has jurisdiction is binding between the parties until reversed."

Welsh v. Childs, 17 O. S. 320.

The latest cases likewise hold that the parties are concluded by a judgment of a court of competent jurisdiction in Ohio, until the judgment is *reversed or set aside.*

Hixson v. Ogg, 53 O. S. 361.
Cincinnati v. Emerson, 57 O. S. 139.
Heck v. Window Glass Co., 16 O. C. C. 111.

In this last case the judgment was pleaded by supplemental answer, and the court holds:

Error proceedings do not vacate.

"Until reversed for cause a judgment not only binds the parties to the action, but it settles the status of property in controversy."

The whole doctrine was discussed in *Cadwallader v. Evans*, 1 Disney 585, and the Ohio cases reviewed, and the court say:

"It is well settled that the judgment is valid until it is directly adjudicated by reversal before an appellate or superior tribunal. No collateral inquiry will be permitted as to the mode pursued by the court rendering the decree. All parties are forever concluded while the decree stands."

Cadwallader v. Evans, 1 Disney, 585, 590.

So far as we are able to find there are no Ohio decisions opposed to these. So that the rule which

obtains in the federal courts and in all the state courts, but one or two prevails in Ohio.

Ransom v. City of Pierre, 41 C. C. A. *588.*
Railway Co. v. Townbilby, 100 U. S. 78, *81.*

Following the rule above quoted from Sharon v. Hill, as the rule adopted by the federal court, the court need look no further than to learn what force or effect is given to an Ohio judgment by her own courts.

Pleadings and judgment.

Were the questions necessary to be decided to entitle the water company to relief in the case in the federal court in controversy in the state court, and were these questions or any of them decided in the state court? This can be determined only by examining the pleadings in the two cases and the judgment in the state court. In federal court, bill, pp. 1 to 10; amendment, 25, 6; supplemental bill, 33, 34; amendment, 86; answers, 52, 56; replication, p. 80; plea, p. 89; replication to plea, 97.

In state court, petition, pp. 148, 150; answer, 166 to 174; reply, 175 *et seq.*; final decree, Rec., p. 192.

It is worthy of note in this connection, that, when the court of common pleas of Defiance county sustained the water company's demurrer to the city's petition and dismissed the case, the water company, by supplemental bill in the U. S. circuit court, pleaded that adjudication as a final adjudication in its favor. (Rec., p. 33.) But in due time this judgment was appealed from and the matter so pleaded thereby set at large. (Rec., p. 33; Rec., p. 164.) Thereupon the water company filed its answer in the state circuit court and averred among other things that if the case in the state court were decided adversly to the water company it would prevent any further proceedings in this case and end and determine this action. (Rec., p. 174.)

Plead as ad judication by complainant.

See cases cited at pages 6 and 8 of this brief.

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Did the court err in its order refusing to hear the cause upon the issues formed by the bill as amended, supplemental bill, answer and replication thereto to which defendants' plea did not reach, and as to which the said plea ought not in law or equity to avail the defendants: and did the court err in overruling the plaintiff's request and motion for leave to give in evidence its proofs filed in support of said issues?

What is said in the first paragraph of this argument (p. 4), and in regard to the third and fourth assignments of error (*ante*, pp. 12 and 15) is equally applicable here.

If this assignment charges that the plea does not reach any issues tendered by the bill and amendments it is a reiteration of the assignment as to the sufficiency of the plea; and if even one issue was reached by the plea the court did not err in rejecting evidence offered in a mass on all issues.

Assignment insufficient.

If it charges that the plea did not reach some issues and the evidence as to them should have been received, it is insufficient because founded on no objection or request by which the attention of the lower court was called to those particular issues and it given an opportunity to rule on a specific question. The assignment does not point the court to any particular issues, but specifies them as "those to which the plea does not reach," and "those as to which the plea ought not to avail," without indicating which issues it means by "those to which the plea does not reach and ought not to avail," and offering evidence on them. It seems to us such assignments are no better than if a party should say the court erred in admitting evidence which ought to have been rejected.

Issues not reached.

If we can read the bill and amendments and answer thereto in the federal court and the petition and answer and reply in the state court and the plea in the federal court, every material issue in the federal court is shown by the pleadings to have been in controversy in the state court; and that the plea sets forth the pendency of a suit in a court of competent jurisdiction, between the same parties as those in the case at bar, that all the matters in controversy in the case at bar were at issue in that case; that a trial of said issues was had on the merits thereof in said state court and a final judgment was rendered thereon in favor of said city of Defiance and against said council and said water company, whereby said issues therein, which included all the matters in controversy in this case, were adjudged and decided in favor of said city and against said council and said water company.

If controlling question decided.

If every issue tendered by this bill were not duplicated by some issue joined by the pleadings and decided in the state court: yet if any material matter, without proof of which the water company could not have a decision and decree in its favor, was in issue and was decided adversely to the water company in the state court, decision on that issue is sufficient to determine the whole matter and constitute a complete bar.

Aetna Life Ins. Co. v. Board Comrs., 117 Fed. Rep. 82.

Bissel v. Spring Valley, 124 U. S. 225, 236.

The opinion of the circuit judge in allowing the plea to be filed states the matter very clearly and we refer the court to page 88 of the record.

In the case at bar one thing is essential to the complainant's right to recover, viz.: a contract with the city valid and binding in its inception; or a contract with the city so fortified by estoppels as to make it enforceable and payments under it proper.

In the case in the state court the court found and decided:

"That the said contract of August 17, 1887, attempted to be made and entered into by and between the City of Defiance and Samuel R. Bullock & Company, under which the said defendant, The Defiance Water Company, claims, and which is the contract and ordinance mentioned and referred to in the petition of said plaintiff and the answer of said defendant water company, was, and is unauthorized, in contravention of the law, prohibited, illegal and void, and that the said council of the city of Defiance was without power or authority to make the same or to pay money to said water company under said contract, and that the payment for water under said contract would be a misapplication of the funds of the city, and that all such payments and the execution of said contract should be perpetually enjoined and that said plaintiff is entitled to the relief in its petition herein prayed for; * * *" (Rec., p. 193.)

Contract is essential.

The jurisdiction of the federal court depended on the existence of a valid contract and the passing of a law (ordinance or resolution) impairing its obligation. If there were no valid contract there could be nothing to impair.

Jurisdiction depended on.

Trustees of Bishop Fund v. Ryder, 13 Conn. 86.
Baker v. Town of Union, 44 N. J. Law, 259.
Fitzgerald v. Grand Trunk Ry. Co., 13 Law Rep. Ann., 70.
Same case, 63 Vermont, 169.
Synod of Dakota v. So. Da., 14 Law Rep. Ann., 419, *421*.

We think complainant's bill and the answer, pp. 64-69, showed lack of jurisdiction which this court should recognize as soon as called to its attention.

Boston & M. etc., Co. v. Montana, etc., Co. (Sup. Ct.) Dec. 3, 1902, adv. sheets Co-op. Pub. Co. No. 9, pp. 434, 437, *et seq.*

When the illegality of this contract appeared and that there could be no impairment of it the federal court could not retain jurisdiction of the case but was bound to forthwith dismiss the suit.

Opinion Judge McClain, Butler v. Penn., 10 How., 402, *419*.
Robinson v. Anderson, 121 U. S. 423.
Shreveport v. Cole, 129 U. S. 36, 44.
St. Paul v. St. Paul Gas Co., 181 U. S. *142*.
Little Gold Mining Co. v. Kees, 96 U. S. 199, *203*.

Review by error to state court.

True, the federal court decides for itself the question of impairment; but when that question has been decided adversely in a state court so as to constitute *res adjudicata* it must reach the federal court of last resort by a review of the judgment in the state court in which the decision which constitutes the former adjudication was rendered.

Allen v. Allen, 38 C. C. A. 336.
New Orleans v. Benjamin, 153 U. S. 341.

The principles governing this question have been so aptly stated and such judicious selection of a few leading cases made by the circuit court of appeals in two very recent cases, that we refer the court to those decisions and the cases cited:

Aetna Life Ins. Co. v. Board Comrs., 117 Fed. Rep. 83.
Union Savings & Loan Assn. v. Byrne, 52 C. C. A., p. *465*.
See Dowell v. Appelgate, 152 U. S. 327.

Evidence offered not printed.

Again: The water company tendered all its evidence taken on the general issue; if any was incompetent or immaterial and was properly rejected the action is not ground for reversal. The presumption is the judgment of the lower court was right, and, we apprehend, an appellate court is not called upon

to examine evidence not printed to see if there was any of it which should not have been rejected.

Kent v. State, 42 O. S. 426, 430.

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Did the court err in holding that said plea extended to the whole of the issues joined in the circuit court; and that it was conclusive thereof?

Did the said court err in its final decree in favor of the defendants and in dismissing the suit with costs to said defendants?

This depends on the solution of the questions presented by the first, second and seventh assignments above considered.

Here again no one or more issues are pointed out and objection made to the court's ruling as to that, and assignments based on specific rulings.

If the plea was properly sustained and finding and judgment proper for the defendants, it is immaterial whether the findings and reasons therefor were right or wrong. If the plea was properly sustained as to any issues or issue which were conclusive as to the water company's right to recover in the suit at bar a finding that the plea was conclusive of all the issues was justified, and a final judgment dismissing the water company's bill and for costs against it was proper.

Finding and judgment was justified.

See cases cited, pp. 5, 6, 8 and 9, *ante.*

Several grounds have been suggested as the basis of the claim that the judgment in the state court was not conclusive.

It is said that the suit in the federal court was on a question of a quantum meruit and this issue was not made in the case in the state court.

The city, by its solicitor, in the state court, averred the council was treating the contract a

Quantum meruit.

valid and intending to pay the full amount claimed by the water company on it, and set forth the facts which made the contract void and any payments under it illegal. These last facts were denied by the water company, thus making a clean-cut issue as to indebtedness. As we understand it, there is no issue of an implied liability tendered in the circuit court. The suit is on an express contract, with averments of fact and of legal conclusions which it is claimed estop the city and its council from asserting the illegality of the contract or refusing to pay the amount claimed under it. The averments are in almost the identical words as those in the answer in state court.

For another controlling reason this position is untenable. A party cannot, in a single cause of action at one time, maintain a suit for the same relief on both an express and an implied contract.

Creighton v. City of Toledo, 18 O. S. 447, *452*.
Abbot v. Inskip, 29 O. S. 59, *61*.
White v. Merrill, 16 Am. Dec. 238.
King v. Woodruff, 60 Am. Dec. 625, *628*.
Mass. v. Fairbanks, 37 Am. Rep. 303.
Chase v. Railway Co., 97 N. Y. 384.
North v. Nichols, 37 Conn. 375.

No quantum meruit till contract repudiated.

Again, we submit, this claim is not well founded because the adjudication that the contract is illegal, prohibited by express statute, and void, bars the water company from any action in any form under which it is necessary to aver or prove the illegal contract. No action on a *quantum meruit*, either at law or equity, can be maintained unless the illegal contract is repudiated.

Pullman Pal. Co. v. Cen. Tran. Co., 171 U. S. 138.
S. C., 139 U. S. 62.
Pitts., etc., Ry. Co. v. Keokuck B. Co., 131 U. S. 371.

MacMullin v. Huffman, 174 U. S. 638.
Logan Co. v. Townsend, 139 U. S. 67, 77.
Dis. of Col. v. Bailey, 171 U. S. 161.

In the last case the prohibition was in almost the identical words as that in the Ohio statutes.

Identity of parties.

It is said the two suits are not between the same parties in the same right, because the city's suit was brought by its solicitor.

Section 1777, Ohio Statutes, requires the city solicitor to apply *in the name of the city* for an injunction to restrain (1) the misapplication of the funds, (2) the abuse of the corporate powers, (3) the performance of any contract made in behalf of the corporation in contravention to law, (4) the forfeiture of any contract which is contrary to law.

Council a proper party.

No less than eleven times in its answer in the state court the water company refers to the city as "the plaintiff" in the suit; and alleges the pendency of this suit in the federal court and avers it is between the same parties as the suit in the state court. (Rec. p. 174.)

Section 1678 of the Revised Statutes of Ohio provides the council shall have the management and control of the finances and property of the city.

Section 1693 provides contracts, agreements and obligations can only be made by ordinance or resolution of the council.

By section 1693 all money must be appropriated and ordered paid by ordinance of the council.

So that this seems to us to be one of those cases mentioned by Judge Caldwell in Herrick v. Cleveland, "where it is proper to bring suit against the council." The record from the state court shows the council employed attorneys, who appeared and took part in the case (Rec. p. 156), and that, finally, a decree was entered against the council and the water company enjoining any action or proceeding being taken by the council to pay the water company's claims, or the further carrying out of this contract.

(Rec. p. 192.) As stated by Judge Wanty on the motion to make service on the new members of the council:

Same.

"The council as a body must act in order to bind the city in any manner. The individual members as individuals are not proper parties, but the council as a body or board is a necessary party, being the seat of power from which emanates the acts, the performance of which is sought to be compelled or prohibited."

Sections 6756 and 6757 recognize the right of the city council to be sued and for judgment and orders to be made against it, when municipal action touching financial matters is to be controlled by the court under the law.

In *State ex rel.* v. *The City of Cincinnati and the Council of Cincinnati*, the council was sued, answered, and judgment was rendered against it by the Supreme Court of Ohio. (19 Ohio, 178.) This was followed in 54 O. S. 631.

Solicitor's suit.

It is said the city, as represented by the city solicitor, in the suit to enjoin the performance of an illegal contract, is in a different relation from the city when sued by the water company to compel the performance of the same contract. That the city, in whose behalf the suit is brought, under Sec. 1777, is not the city in the same right that makes the contract. The statute is against this view. The power which has the right to make the contract is the one that has the right to see it legally performed or to prevent the performance of an illegal contract or the payment of money thereunder. Municipal corporations have but two relations, governmental—legislative and public, and proprietary—private. In the first it represents the state, and makes no contracts, enforces none. In the second, it makes contracts and looks after all its proprietary interests. These views are confirmed by our courts in:

City's relations.

Toledo v. Gas Co., 5 Ohio C. C. 557.
Cincinnati St. Ry. v. Smith, 29 O. S. 291.
Cincinnati v. Cameron, 33 O. S. 336.
Knorr v. Miller, 5 Ohio C. C. 609, *614*.

The state court clearly had jurisdiction of the subject matter and the council was served and appeared in the case. On its motion, the cause was remanded from the federal to the state court on the ground that the state court and not the federal court had jurisdiction of the parties, and of the subject matter. No objection was ever made, either by demurrer or answer, that there was a defect of parties defendant, hence, under Section 5064, all such questions were waived. (Tootle v. Coleman, 107 Fed. Rep. 41, 4th Syl.) At any rate, the party is the same and by the same name as that in the suit in the federal court. Suppose a judgment were rendered in this suit ordering the council to allow and the city to pay the water company's bills, the council and the city would be in an unenviable position if they should refuse to obey the court's order under a claim that the federal court had no jurisdiction to make an order against the council. That the person holding an office is not named is an immaterial omission, as adjudged in:

Question waived and decree final.

Bridge Co. v. Mayer, 31 O. S. 317, *323*.

It is said the federal case involves a charge by the water company of collusion and conspiracy between the city solicitor and the council and for that reason the doctrine of *res adjudicata* has no application.

Issue of collusion no bar to plea.

It cannot be that because collusion and conspiracy in the bringing of the first suit is charged, the adjudication is any less a bar, while the judgment there entered stands.

Wilson's Ex. v. Dean, 121 U. S. 525, and cases cited.

Same issue in state court.

The same charge of conspiracy was alleged as a defense in the answer in the suit in the state court as is charged in the bill in the federal court. An issue was joined on that answer, tried, and decided adversely to the water company. The rule is "*every right, question, or fact, distinctly put in issue and directly determined * * * is res adjudicata.*" There are no exceptions as to the character of the suit or the nature of the facts, right or question; an issue as to fraud or conspiracy is as finally adjudicated as an issue as to the execution of or amount due on a promissory note.

Indeed, the charge of fraud or collusion is not available here to weaken the effect of the judgment in the state court.

Union Trust Co. v. Rochester, 29 Fed. Rep. 609, and cases.
Peninsular Iron Co. v. Eells, 15 C. C. A. 190.
K. C., F. S. & M. R. Co. v. Morgan, 76 Fed. Rep. 429, *434*.
Christmas v. Russell, 5 Wall. 290.
Hilton v. Guyot, 159 U. S. 113, *185*.
Anderson v. Anderson, 8 Ohio 109.
Knapp v. Thomas, 39 O. S. 377, *387*.

There is no claim that the state court was procured to assume jurisdiction or that the water company was prevented from making defense by fraud of defendants or either of them. The water company made the same charge and it was decided against it in the state court. (Rec., p. 173.)

Judgment may be plead any time before judgment.

It is contended that the judgment in the state court was entered after issues were made up in the federal court and hence comes too late.

Mr. Van Fleet adopts and quotes the following, as the law pertinent to this subject:

"Even in cases wherein the judge has commenced the trial of an issue, which is also an issue in a pending litigation, a final judgment pronounced

meanwhile in the previous litigation should operate as *res adjudicata*, preventing the judge dealing with the latter litigation from adjudicating differently. If this is not done, the evil against which *res adjudicata* aims will not be removed and the doctrine itself will be defeated."

Vol. 1, page 90.

In the case of Duden v. Maloy, 43 Fed. Rep. 307, this rule was adopted where a judgment was rendered after a master had made his report.

It is said the overruling of defendant's demurrer to the water company's bill settles all questions as to the sufficiency of the contract in controversy and that question was no longer open in the federal court and the decision of the state court of no moment.

Interlocutory ruling on demurrer.

In Foster's Federal Pleading & Practice, it is said: "*An answer may contain defenses which have been previously raised by plea or demurrer, and overruled.*" Vol. 1, Sec. 144. See last paragraph of opinion of Mr. Chief Justice Taney, in *Rhode Island* v. *Mass.*, 14 Pet. 210, *262*.

Mr. Daniels gives the same rule and in a note says:

"On the overruling of a general demurrer it would be error to enter a final decree without giving defendant an opportunity to answer."

Daniel's Chanc. Prac., Vol. 1, 628.

It is only when a final judgment is rendered on demurrer that matters involved are finally adjudicated.

Price v. Coleman, 22 Fed. Rep. 694.

In the American & English Enc. of Law the author cites several authorities to this point, and says the proposition is so manifest that further citations are unnecessary.

A ruling on a demurrer is only an interlocutory order unless final judgment or decree is made and entered. Merwin, 564.

Bennet v. City of Louiville, 62 S. W. Rep. 1041 (Ky.).
Linder v. Lewis, 4 Fed. Rep. 318.
Clarke v. Blair, 14 Fed. Rep. 812.

Same.

In *Fournquet* v. *Perkins*, *16 How. 82*, *86*, counsel objected to a decree entered on hearing of exceptions to the master's report, because it was adverse to the opinion and order formerly announced by the court on hearing. In overruling this objection Mr. Justice Taney says:

"The case was at final hearing at the argument on the exceptions; and all of the previous interlocutory orders in relation to the merits were open for revision, and under the control of the court. This court so decided when the former appeal hereinbefore mentioned was dismissed for want of jurisdiction. And if the court below, upon further reflection, found that it was in conflict with the decision of this court, it was its duty to correct the error."

This was followed in a ruling on a demurrer in:

Wooster v. Handy, 21 Fed. Rep. 51, *53*.

See also:

Baldwin v. Creed, Wright's Rep. 729 (Ohio).
Holbrook v. Connelly, 6 O. S. 199.
Krouse v. Streicher, 15 O. C. C. 199.

Ruling on demurrer not final.

Linder v. Lewis, 4 Fed. Rep. 318.
Clarke v. Blair, 14 Fed. Rep. 812.
Reeves v. Keystone B. Co., Fed. Cases, No. 11,661.
Breedlove et al. v. Nicolet, 7 Pet. 413, last Syl.

Mr. Chief Justice Waite, speaking for the court, in Alley v. Nott, says:

"A demurrer * * * when tried will finally dispose of the case as stated in the complaint, on its merits, unless leave to plead over or amend is granted. * * * And if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties which can be pleaded in bar to any other suit for the same cause of action."

Alley v. Nott, 111 U. S. 473; B. 28, p. 490.

Mr. Van Fleet says:

"A judgment rendered for the plaintiff for *want of answer*, upon overruling a demurrer to his complaint for want of merits, will make the matter *res adjudicata*."

Van Fleet on Former Adjudications, Sec. 304.

Mr. Freeman says:

"If a demurrer is overruled, *and a judgment thereupon entered, it is on the merits, and it is necessarily conclusive*, in favor of the party against whom the demurrer was interposed, of the material facts confessed thereby, and that they entitled him to the relief given. The judgment is as effective as an estoppel as though the facts had been put in issue and established by a verdict."

Without judgment thereon.

Freeman on Judgments, Sec. 267, p. 483.

The Supreme Court of South Carolina, speaking by Chief Justice Smith, says:

"A demurrer to the merits of a complaint or other pleading overruled and followed by a final judgment, is decisive of all the material facts charged and is conclusive of them."

Johnson v. Pate, 90 N. C. 334.

Mr. Justice Field says:

"The final judgment entered upon that demurrer is a bar to any further action upon the specific coupons in suit. * * * If the party against whom a ruling is made on demurrer wishes to avoid the effect of the demurrer as an admission of the facts in the pleading demurred to, *he should seek to amend*

his pleading or answer, as the case may be. Leave for that purpose will seldom be refused by the court upon a statement that he can controvert the facts by evidence which he can produce. If he does not ask for such permission the inference may be justly drawn that he is unable to produce the evidence, and that the fact is as alleged in the pleading."

Bissell v. Spring Valley, 124 U. S.; B. 31, p. 413.

In *Scherff* v. *Railway*, 26 Am. Rep. 828, speaking of a demurrer to a bill where leave to amend had been allowed upon demurrer sustained, and where plaintiff did not amend but afterwards voluntarily dismissed his petition, the court say:

Same. "Yet the leave to amend takes from the judgment that quality of finality which is necessary to make it an estoppel, and thus 'sets the matter at large.'"

So we take it, if the demurrer is overruled and leave given to answer, the leave to answer "sets the matter at large," and as stated by the court in the last case, it is an interlocutory judgment. In all such cases the decision which is binding and has the force of *res adjudicata* is a final judgment on the demurrer, terminating the litigation in the court making the adjudication.

Williard v. Ostrange, 32 Pac. Rep. 1092 (Kansas).

In *Fuller et al.* v. *Knapp et al.*, a demurrer on the ground of want of equity was filed to the bill, argued the demurrer overruled, and the defendants given leave to answer, whereupon the defendant answered and at the same time demurred again to the whole bill. Judge Wallace, on deciding a motion to remove the demurrer, says:

"A defendant cannot, at the same time, answer and demur to the whole bill, though he may demur to part and answer to the residue. Equity Rule 32.

After a demurrer has been overruled, a defendant may insist upon the same matter by way of defense in his answer."

Fuller et al. v. Knapp et al., 24 Fed Rep. 100,

It is urged the ruling on the demurrer is the law of the case, and controls the action of the court.

Law of the case.

"Law of the case," means only the decision on appeal or error by the appellate court.

VanFleet on For. Adj., pp. 1307 and 1308.

The judgment must have been in another case. Mr. Van Fleet says:

"It is necessary, however, that the decision must have been in another suit, as the doctrine of *res adjudicata* has no application to decisions in former stages of the same suit."

Van Fleet on Res Adjudicata, p. 90, Sec. 24.

Ruling on demurrer not plead in state court.

If the ruling on the demurrer was a judgment which finally adjudicated the construction of the statute and contract, its use for that purpose was waived by failure to plead it in the state court. On this subject the author last quoted says:

"The last judgment rendered in regard to a matter is *res adjudicata*. The former judgment must be used to prevent it. It calls upon the adverse party to show all his reasons why it should not be rendered; and one of his reasons is that another court has determined the matter. But if he does not bring that fact to the attention of the court, or if he does do so and it is disregarded, in either case the former judgment, the same as all other defenses, is concluded."

Van Fleet, Res. Adj., p. 91, Sec. 24, last par.
Cooley v. Prayton, 16 Ia. 10, 18.
Baterman v. Railway Co., 96 Mich. 441.
Same Case, 56 N. W. Rep. 28.

The ruling on the demurrer is adverse to a ruling of the Supreme Court of Ohio on a statute passed the same day as the one in question and in the same words, except that it relates to gas instead of water companies, and against the decision of the circuit court of appeals in an Ohio case on the same subject, and against numerous other decisions of the state and federal courts, with no decision supporting it under a like statute. The statutes are: 83 O. L. 146; 82 O. L. 261; 82 O. L. 262.

Ruling contrary to Ohio and other cases.

City of Wellston v. Morgan, 59 O. S. 147.
Manhattan Trust Co. v. Dayton, 8 C. C. A. 140.
Gas Light and Coke Co. v. City of New Albany, 59 N. E. Rep. 176.
Beeson v. City of Chicago, 75 Fed. Rep. 881.
Brazonia v. Youngstown Bridge Co., 25 C. C. A. 306.
Litchfield v. Ballou, 114 U. S. 190.
Trust Co. v. Galesburg, 133 U. S. 156, 5th find. app.
Hedges v. Dixon Co., 156 U. S. 182, *192*.
Sullivan v. Bailey, 83 N. W. Rep. 996 (Mich).
Davis v. Harrison, 46 N. J. Law, 79.
Barrie v. Earl, 143 Mass. 4.
Taylor v. Lambertville, 10 Atl. Rep. 809.
Somerset v. Smith, 49 S. W. Rep. 456.
Logansport R. R. Co. v. City of Logansport, 114 Fed. Rep. 688.
Puney v. Milwaukee, 84 N. W. Rep., 22 (Wis.).
Jones v. Seattle, 38 Pac. Rep. 682 (Wash.).
Trestner v. City of Sheboygan, 58 N. W. Rep. 746 (Wis.).
McAleer v. Angell, 36 Atl. Rep. 538 (R. I.).
Mealy v. Mayor of Hagerstown, 48 Atl. Rep. 746 (Md.).

City of Ft. Scott v. Eads Bridge Co., 117 Fed. Rep. 51. (C. C. A.)
State v. Board St. Comrs., 26 Atl. Rep. 92 (N. J.).

Statute relied on construed.

The very words of the statute relied upon by appellant as authorizing the contract had been construed by the Supreme Court of Ohio.

State v. Clerk of Chillicothe, 7 O. S. 147.

The rule is that the legislature used these words, in the statute afterward passed, with reference to and in accordance with the construction so given them.

Grogan v. Garrison, 27 O. S. 50, 59.

A reversal would not be equitable.

It would be a monstrous doctrine if a party, after the most diligent efforts at every stage of the proceedings to obviate a conflict of authority, should be subject to a mandatory order of the federal court to carry out, perform, and pay money under a contract, and an equally authoritative and imperative order of the state court not to perform, carry out, or pay money under the same contract; and by reason of which orders the litigant could not obey one without being in contempt of the other.

It would be ground of just reproach to our system of concurrent state and federal jurisdiction, if, to a party who is dragged against his will into both forums and who omits no safeguard provided by law to obviate conflict, it offers no alternative except final judgment in both courts, which judgments may be diametrically conflicting, and which, if conflicting, must involve him in unavoidable and inextricable conflict with both the state and federal judiciary.

Remedy by review of state court's judgment.

It must be the learned circuit judge was right, when he said: "Since, in a suit between the same parties, the contract has been interpreted and the rights of parties thereunder finally adjudicated, and that adjudication plead as a bar to the suit and satis-

factorily proved, this suit must be dismissed; and if parties desire to have their rights under the contract passed on by the federal court of last resort they must do so by appropriate proceedings for the review of the decision of the state court."

FRED L. HAY,
City Solicitor.

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JOHN P. CAMERON,
Solicitors for the Council of the City of Defiance.